

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

NORMA FIORENTINO, <i>et al.</i> ,))	CASE NO. 3:09-CV-02284 (JEJ)
)	
Plaintiffs,)	District Judge John E. Jones III
)	
v.)	
CABOT OIL AND GAS)	
CORPORATION, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION TO DISQUALIFY CABOT'S COUNSEL**

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PRELIMINARY STATEMENT

Counsel for Defendants Cabot and Oil Gas Corp. and Gas Search Drilling Services Corp. (collectively referred herein as “Cabot”), the firm of Fulbright & Jaworski, LLP (“Fulbright”) and firm partners Amy Barrette and Jeremy Mercer, concurrently represent Cabot and Mr. and Mrs. Deborah Maye, a non-party whom the Pennsylvania Department of Environmental Protection (“PADEP”) found had groundwater contaminated by Cabot’s fracking activities identical to many of the Plaintiffs in this litigation. Defense counsel denies that Cabot caused any contamination and claims that the Maye’s water is safe to drink, eliminating any conflict to the joint representation. Plaintiffs, by and through counsel, disagree and are now compelled to seek disqualification of opposing counsel, who have a material and non-waivable conflict of interest in the aforesaid joint representation.

PROCEDURAL HISTORY

This Court is familiar with the procedural history of this matter, which will not be repeated here for the sake of brevity and efficiency. *See, e.g., Fiorentino v. Cabot Oil & Gas Corp.*, 750 F.Supp.2d 506, 508-10 (M.D.Pa. 2010). (Defendants' motion to dismiss was therein denied in part and granted in part.) The parties are currently engaging in fact discovery, which was extended to January 16, 2012 via the Court's November 10, 2011 Order granting plaintiffs' motion to extend fact discovery. Defendants' motion for reconsideration was summarily denied on November 30, 2011. Depositions of the plaintiffs have been completed, some depositions of defendants' representatives and non-parties remain, many of which were challenged by the Defendants, including that of Mrs. Maye. These motions pertaining to the remaining depositions are pending before Special Master Walsh.

RELEVANT FACTUAL HISTORY

Mr. and Mrs. Maye's interests have been and remain adversarial to Cabot since their well water became contaminated by Cabot's hydraulic fracturing ("fracking") activities.¹ Their water contamination, like that of the plaintiffs in this litigation, continues to the present² and creates a conflict of interests that should prevent any attorney from representing both Cabot and the Mayes. This conflict is

¹Declaration of Tate J. Kunkle, ¶ 7 (hereinafter "Kunkle Decl.").

² See Executive summary of groundwater sampling data evidencing fracking constituents in plaintiffs' in their potable water, Kunkle Decl., ¶ 15, Exhibit G.

in no way ameliorated by Cabot simultaneously providing financial support to the Mayes in the form of financing the continued delivery of bottled potable water after it represented that such deliveries had ceased, including the water deliveries that had previously been provided to the Plaintiffs in this litigation.³ To the contrary, this remuneration creates another untenable conflict requiring the termination of the joint representation of Cabot and the Mayes by defense counsel.

Cabot's Position Is Adverse To The Mayes And Other Homeowners

As exemplified by Cabot's public statements, communications with the Press, communications with the PADEP, filings with the Pennsylvania Environmental Hearing Board ("PAEHB") and claims made off record during conferences with Special Master Walsh, Cabot denies that it ever contaminated any of the underground water supplies in Dimock⁴, denies that the groundwater in Dimock was or is contaminated⁵ and claims that the water from private wells, including those of the Mayes' and plaintiffs' in this litigation, meet applicable clean water regulations and is safe for human consumption⁶.

³ Kunkle Decl., ¶¶ 5-11.

⁴ Kunkle Decl., ¶ 5, Exhibits B & C; ¶ 13, Exhibit F.

⁵ Kunkle Decl., ¶ 5, Exhibits B & C; ¶ 7, Exhibit H; ¶ 12, Exhibit E; ¶ 13, Exhibit F; ¶ 15; Exhibit G.

⁶ Kunkle Decl., ¶ 7, Exhibit H; ¶ 12, Exhibit E; ¶ 13, Exhibit F.

Pursuant to the December 15, 2010 Consent Order which Cabot secretly negotiated with the PADEP, as well as prior Consent Orders, Cabot was required to finance the temporary supply of potable water to certain households whose groundwater was determined by the PADEP to have been contaminated by Cabot.⁷ The Mayes were one of the identified households, as were many plaintiffs in this litigation.

Cabot has long sought to terminate the delivery of this free potable water, all the more so since mediation efforts with the plaintiffs in this litigation have ensued.⁸ Following the first scheduled mediation session, Cabot attempted to have the PADEP cancel the free water deliveries prior to the next scheduled mediation session, which the PADEP rejected. After stonewalling in the first mediation session in the first week of October, on October 11, 2011, Cabot held another “secret” meeting with the PADEP. On October 17, 2011, Cabot submitted edited, self-serving information to the PADEP to request they be able to stop delivering water to the plaintiffs.⁹ On October 18, 2011, clearly without so much of a glance at the data, the PADEP granted Cabot’s request to stop delivering water.¹⁰ This

⁷ Kunkle Decl., ¶ 5, Exhibits B.

⁸ Cabot unilaterally cancelled the first scheduled session one business day before it was to have occurred on September 12, 2011 because of so-called “security concerns.”

⁹ Kunkle Decl., ¶ 7, Exhibit H.

¹⁰ Kunkle Decl., Exhibit I.

decision was subject to two superseded proceedings brought by plaintiffs in this litigation seeking to continue Cabot's legal mandate to provide free temporary potable water before the PAEHB in November and December, 2011. In those proceedings, Cabot took the positions that the well water relied upon by the plaintiffs and the Mayes was safe to drink and that the whole house gas mitigation system offered by Cabot was sufficient to eliminate any contamination concerns.¹¹

Cabot ceased delivering free water to all households identified in the December 15, 2010 Consent order on December 1, 2011, that is except for the Mayes.¹² Nevertheless, Cabot's counsel, the Fulbright firm and Mr. Mercer and Mrs. Barrette, have successfully terminated Cabot's current legally enforceable obligation to deliver temporary potable water to the Mayes while that counsel simultaneously represents the Mayes.

Cabot has adulterated water samples by filtering and removing contaminants before conducting the testing, withheld test data and has failed to provide test data that contradicts its arguments before this Court and the PAEHB. For example, Cabot took water samples from several plaintiffs' properties on August 4, and September 1, 2011 that were processed by their test lab on or about September 7, 2011, but were withheld until serving them via first class mail on November 21,

¹¹ Kunkle Decl., ¶ 7, Exhibit F.

¹² Kunkle Decl., ¶¶ 5-11.

2011.¹³ Cabot has similarly failed to disclose data provided to the PADEP in December, 2011 and never identified nor revealed to the plaintiffs, the PADEP nor the Mayes that groundwater monitoring test wells have existed for several years. Cabot have never produced any test data from those wells. Clearly, Cabot is stalling or failing to meet its obligation to the Mayes, the plaintiffs, the citizens of Pennsylvania and the PADEP to timely and accurately disclose data about the true state of groundwater contamination.

Indeed, Cabot's own testing, withheld during the time that the PADEP rescinded its order that free potable water be provided to the Mayes, showed that the groundwater was not safe for human consumption.¹⁴ Plaintiffs' testing revealed the presence of dangerous levels of metals.¹⁵ Moreover, the "whole house gas mitigation system" installed by Cabot in the Mayes' home does not filter out the dangerous contaminants, which reportedly leaves the water unpalatable to the eye and to taste, which is presumably why the Mayes still receive free bottled

¹³ Kunkle Decl., ¶ 15, Exhibit G. The lab reports indicate that the water samples were first put through a .45 micron filter before testing, small enough to remove a substantial portion of heavy metal contamination, such as Iron and lead, which appears in accurate levels when no filter is used on water samples prior to testing. Kunkle Decl., ¶ 16.

¹⁴ Even a partial review of the water well test data from nearby water wells shows contamination of naphthalene, phenanthrene, butyl benzyl phthalate, 1-methylnaphthalene, 2-methylnaphthalene, ethylene glycol, diethylene glycol, triethylene glycol, 2-methoxyethanol, methylene blue active substances, gas range organics, acetone and ammonia (distilled). Kunkle Decl., ¶ 15, Exhibit G.

¹⁵ Kunkle Decl., ¶ 16.

water from Cabot despite the installation of the filtering system offered by Cabot in their home.

The plaintiffs have long asserted that the filter system offered by Cabot is not sufficient to either make the water safe for household purposes nor to satisfy Cabot's obligation under Pennsylvania to restore the well water of the plaintiffs and the Mayes to its pre-contamination condition.

***The Mayes Have Previously Acknowledged
Adverse Interests With Cabot***

Prior to the present when they alone among all the homes in Dimock continue to receive free potable water from Cabot, the Mayes have acknowledged their adversarial position with Cabot.

The Mayes apparently entered into an oil and gas lease with Cabot. As plaintiffs' claim in this litigation, Cabot apparently failed to provide the Mayes with promised royalties nor did it fulfill other obligations under the lease. In a March 7, 2009 email, Mrs. Maye wrote "I still don't understand why so many people have told us we are going to get royalties from the Baker well if it isn't true. We're so much closer to it than most of the other people."¹⁶ Another email of the same date from Mrs. Maye states:

In Jan. one of Cabots [sic] lawyers told me we'd be so happy with Cabot . . . when he got our first royalty check . . . About 2 wks ago a land man came and wanted us to

¹⁶ Kunkle Decl., Exhibit "J".

sign a paper giving up our rights if we should sell our house. He too told us we would get royalties from the Baker well. Isn't it strange our property is closer than most of the others, our water has been ruined, they refuse to do anything at all to help us, now we don't get any royalties?"¹⁷

Another email from Mrs. Maye dated Jan. 24, 2009 that supports plaintiffs' fraudulent inducement cause of action states "[m]y neighbor was told that Cabot said no one at our end of the street was going to be paid anything because our properties are too small. . . We were told if we didn't sign none of the neighbors would get any money".¹⁸

Additionally, the Mayes formerly believed, and may still believe, that Cabot's oil and gas drilling activities contaminated their water supply. In an email dated March 22, 2009, Mrs. Maye wrote "we have had issues with our water since the end of Oct./start of Nov. and no one had done anything about it."¹⁹ Another email from Mrs. Maye dated Jan. 26, 2009 states in part, "I tried again today with the water in a bottle and it will still ignite."²⁰ Additional documents support plaintiffs' allegations:

¹⁷ Kunkle Decl., Exhibit "K".

¹⁸ Kunkle Decl., Exhibit "L".

¹⁹ Kunkle Decl., Exhibit "M".

²⁰ Kunkle Decl., Exhibit "N".

Email dated Jan. 24, 2009- “We also have gas in our water and can shake it and light it up.”²¹

E-mail dated September 14, 2009 regarding a treatment system- “The two rooms in our basement that our children had previously used are now ruined. We had to rip up the carpet and our son had to move out of his bedroom.”²²

E-mail dated October 1, 2009 to Cabot- “Our glasses and dishes are covered in a film when we get done washing them. Water put in a glass is very cloudy and bubbles. My goat is now sick. WILL YOU PLEASE DO SOMETHING?!”²³

After her water became contaminated, just like many plaintiffs, the Mayes struggled to have Cabot deliver drinkable water and restore their property to its pre-drilling condition as required by law. In a January 24, 2009 email, Mrs. Maye states “[t]hey still won’t give us water. We just signed up with Endless Mountain Water and it cost us over \$260.”²⁴ Another email from Mrs. Maye states:

“[w]hat do you people plan to do to compensate us? . . . It makes no sense at all why you provide water, money, and other things to some people and don’t do squat for others. . . We have not had ONE good experience with Cabot at all. Ever since the first rude, nasty, obnoxious land man came out it’s been all down hill. . . Your company ruined it all for our family.”²⁵

²¹ Kunkle Decl., Exhibit “L”.

²² Kunkle Decl., Exhibit “O”.

²³ Kunkle Decl., Exhibit “P”.

²⁴ Kunkle Decl., Exhibit “L”.

²⁵ Kunkle Decl., Exhibit “O”.

The additional following statements further support Mrs. Maye's adverse and conflicting position from Cabot:

E-mail from Mrs. Maye to Cabot dated September 7, 2009- "Is anyone going to do anything at all about this? I am shocked that Cabot is permitted to treat people in this manner. We have been living with this mess for a year now and still nothing has been done. . . Cabot doesn't do squat for us."²⁶

E-mail from Mrs. Maye to the PADEP dated Aug. 31, 2009- "Is anything being done about Cabot at all and are they ever going to be fined or punished in any way?"²⁷

Cabot's Attempt to Preclude Plaintiffs From Deposing Deborah Maye

Plaintiffs served Mrs. Deborah Maye, a non-party witness, with a pretrial subpoena on September 26, 2011.²⁸ The subpoena called for the deposition to take place on October 14, 2011 in Wilkes-Barre, Pennsylvania. As previously set forth, Mrs. May is a neighboring property owner who has suffered contaminated water similar to the plaintiffs and possesses probative information relevant to plaintiffs' claims. Mrs. Maye also possesses information relevant to Cabot's defenses, including that a "whole house treatment system" can effectively treat the contaminated water and make it usable for drinking and ordinary household uses because she has such a system.

²⁶ Kunkle Decl., Exhibit "Q".

²⁷ Kunkle Decl., Exhibit "R".

²⁸ Kunkle Decl., ¶ 2, Exhibit "A".

On October 12, 2012, two days before the deposition was to take place, Cabot's attorneys filed a motion for protective order seeking to block the deposition. Astonishingly, the motion was signed by Mrs. Barrette, a partner with the Fulbright firm, as counsel for Mrs. Maye.²⁹ This should not be so.

In fact, during a telephone conference with the Special Master, plaintiffs' counsel advised of the apparent conflict of interest of Fulbright representing both Cabot and Mrs. Maye. During the call, Attorney Barrette advised that she and the Fulbright firm were of the opinion that there was no conflict because "Cabot did nothing wrong, Cabot did not pollute the Maye's water, and the water was safe to drink."³⁰

In short, Mr. Mercer, Mrs. Barrette and the Fulbright firm have wished away the clear conflicts that exist in the joint representation of Cabot and the Mayes. The Mayes remain without a permanent solution to the contamination of their well water. Any non-biased counsel without long-term loyalty to Cabot would question the sufficiency of the remedy provided by the December 15, 2010 Consent Order, as well as whether Cabot has lived up to its obligations under it. By ignoring the Mayes' interests and providing them with free temporary potable water as an inducement to permit Cabot's defense counsel to represent them, Mrs. Barrette,

²⁹ See Docket Entry 186

³⁰ Kunkle Decl., ¶ 4.

Mr. Mercer and the Fulbright firm have created non-waivable conflicts that require granting plaintiffs' disqualification motion.

QUESTIONS PRESENTED

1. May an advocate for a party in litigation assert positions adverse to another client jointly represented in the same litigation?
2. May an attorney act and advocate positions adverse to a client that favor another client?
3. May an attorney provide, directly or through a non-attorney, financial support to a client, whether or not it induces representation?

Suggested Answers: "No."

ARGUMENT

POINT I.

FULBRIGHT & JAWORSKI, LLP'S CONCURRENT REPRESENTATION OF CABOT AND DEBORAH MAYE VIOLATES RULE 1.7 OF THE PENNSYLVANIA CODE

Fulbright's concurrent representation of Cabot and Maye is a clear violation of Pennsylvania Code Rule 1.7 (204 PA. CODE RULE 1.7) requiring that the firm be immediately disqualified from representing any parties in this action. Pursuant to Rule 1.7,

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . of the lawyer.

204 PA. CODE RULE 1.7(a). “Rule 1.7. . . give[s] effect to the overarching principle that an attorney owes a duty of loyalty to clients and should not be involved in litigation in which loyalties to two current clients . . . are likely to be divided.”

Vanderveer Group, Inc. v. Petrundy, 1994 WL 314257 (E.D.Pa. 1994).

Fulbright’s representation of Mrs. Maye is materially limited by their responsibilities to Cabot. One of Cabot’s chief defenses is that it did not contaminate the water supply in Dimock. Plaintiffs question how an attorney from Fulbright could adequately represent Mrs. Maye at her deposition likely to contain testimony in direct contradiction to the position their other client, Cabot, has taken in the litigation. It is improper and a clear violation of RPC 1.7.

Similarly, Cabot’s counsel will likely attempt to elicit testimony to rehabilitate Cabot at the expense of Mrs. Maye. Plaintiffs submit that it is improper to have any attorney or client in that position.

Furthermore, any zealous attorney without divided loyalties, fairly and reasonably looking at the water test data, would allege that Cabot has failed to comply with the terms of its leases and the laws of the Commonwealth, both of which require a gas driller to restore a water supply affected by their drilling operations. This includes restoring the water supplies of the Maye’s and the plaintiffs to their original conditions in quality and quantity. Again, an attorney

cannot represent two adverse parties as Mrs. Maye and Cabot because it is impossible.

Cabot claims the whole house treatment system works and provides potable water while Mrs. Maye had to obtain the services of Culligan to try to fix or modify Cabot's system, or get a new system altogether. Mrs. Maye believed, and possibly believes, that Cabot breached its lease by failing to pay the proper royalties due to her, destroyed her property and contaminated her water. Again, these two parties are at such a conflicting position that the Fulbright law firm cannot ethically, and certainly not zealously, represent them both.

Given the Maye's past and current interests and knowledge, it is impossible for Mrs. Barrette or anyone at the Fulbright law firm to be completely loyal to both the Maye and Cabot.

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.

204 PA. CODE RULE 1.7(a) cmt. 29 (2005). Accordingly, Fulbright must be disqualified from representing any parties in this litigation.

POINT II.

**THE CONFLICT OF REPRESENTING MRS.
MAYE AND CABOT OIL AND GAS IS NOT
WAIVABLE AND THUS FULBRIGHT &
JAWORSKI, LLP SHOULD BE DISQUALIFIED**

Although Rule 1.7(b) allows waiver of some conflicts of interest, a conflict is not waivable where the lawyer cannot “provide competent and diligent representation to each affected client.” 204 PA. CODE. RULE 1.7(b); *see also Hesling v. Avon Grove Sch. Dist.*, No. 02-8565, 2007 WL 1030096 (E.D. Pa. Mar. 30, 2007) (“A conflict of interest may be so severe as to impede the fair operation of the courts and preclude continued joint representation, regardless of any waiver.”).

Here, Fulbright cannot provide competent and diligent representation to both the Mayes and Cabot. Mrs. Maye’s water supply is still contaminated and the water treatment system that Cabot provided to her does not work. Cabot is still providing drinking water to Mrs. Maye. Additionally, as plaintiffs are seeking a clean water source such as a supply well with treatment, a pipeline or other alternative, Mrs. Maye would likely desire being hooked into the clean water supply that plaintiffs demand from Cabot.

At deposition, neither Mrs. Barrette nor any attorney from the Fulbright firm will be able to give complete and truthful legal advice to Mrs. Maye without violating their duty to loyally and zealously represent Cabot. Certainly, inaccurate

representations about the safety of the Maye's well water have already publicly been made and presumably have been made in private. Any arguments or objections Mrs. Barrette would make in favor of Cabot in this action would be in direct conflict with the Maye's interests.

There is simply no conceivable way for Mrs. Barrette or her law firm to reconcile her two clients' directly adverse positions. The conflict between representing Cabot and the Mayes is egregious and not waivable.

Where parties are clearly adverse, with both cases centering around the same facts, a lawyer cannot represent them both without directly violating Rule [1.7\(a\)](#). Such a conflict cannot even be waived with informed consent because an independent outside attorney would not condone such dual representation.

Pa. Eth. Op. 89-24 (1989).

Pursuant to Rule 1.10, "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7." 204 PA. CODE. RULE 1.10(a). Here, Amy Barrette, Esq., a partner of the Fulbright law firm, should be prohibited from representing Cabot and the Mayes because of a concurrent conflict of interest under Rule 1.7. Therefore, Fulbright and all of its attorneys should also be prohibited from representing both Cabot and Mrs. Maye in this matter.

When an attorney breaches or may potentially breach an ethical duty, the usual remedy is to remove the offending lawyer. *Albert M. Greenfield & Co., Inc. v. Alderman*, 2001 WL 1855056 (Pa Com. Pl. 2001). This Court's authority to "disqualify an attorney derives from its inherent authority to supervise the professional conduct of attorneys appearing before it." *Mun. Revenue Services, Inc. v. Xspand, Inc.*, 537 F. Supp. 2d 740, 745 (M.D. Pa. 2008) (quoting *United States v. Miller*, 624 F.2d 1198, 1201 (3d Cir.1980)).

As Fulbright has breached an ethical duty, all attorneys associated with the law firm should be removed from this case. See *United States v. Sollenberger*, No. 1:07-CR-205-01, 2007 WL 3052990 (M.D. Pa. Oct. 17, 2007) (disqualifying an attorney from representing defendants in an action where the representation was fraught with actual and potential conflicts). Indeed, even prior to plaintiffs filing this motion, Fulbright should have withdrawn as counsel for both Cabot and Maye in this action. See *International Longshoremen's Ass'n, Local Union 1332 v. International Longshoremen's Ass'n*, E.D.Pa.1995, 909 F.Supp. 287 (E.D. Pa. 1995) ("attorney may not drop one client like a "hot potato" in order to avoid a conflict with another, more remunerative client; such behavior is unethical as it violates attorneys' duty of loyalty.').

POINT III.
PROVIDING REMUNERATION TO A CLIENT
VIOLATES RPC 1.8

Pennsylvania Code Rule 1.8 (204 PA. CODE RULE 1.8) prohibits the kind of financial inducement provided to the Mayes in this matter. Rule 1.8 provides, in pertinent part:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

The clear language of the Rule prohibits a lawyer from advancing a client anything other than certain litigation expenses. Living expenses, including, as here, the cost of providing potable water, are prohibited. RULE 1.8(e) cmt 10 (2005). It does not matter that the remuneration came from Cabot, rather than

directly from the Fulbright firm, because pursuant to RPC 8.4, an attorney cannot do through a non-attorney what an attorney is prohibited from doing.

Similarly, Mrs. Barrette and the Fulbright firm have violated the clear proscription of RPC 1.8 (f)(2) in receiving remuneration from Cabot for representing the Mayes. It does not matter that the Mayes are witnesses, rather than parties, because a lawyer cannot give advice to a witness if his or her client's interests could potentially be in conflict. Pa. Eth. Op. 94-48 (1994). Indeed, RPC 4.3(b) (204 PA. CODE RULE 4.3(b)) expressly prohibits representing or even providing any legal advice (other than to retain separate counsel) to an unrepresented person “if the lawyer knows or reasonably should know the interests of such person are *or have a reasonable possibility of being in conflict* with the interests of the lawyer's client.” *Id.*, (emphasis added).

It is respectfully submitted that the Maye’s interests at least have the reasonable possibility of being in conflict with those of Cabot, requiring Fulbright and its attorneys be disqualified.

POINT IV.
THE CONFLICT OF REPRESENTING MRS.
MAYE AND CABOT OIL AND GAS CERTAINLY
GIVES AN APPEARANCE OF IMPROPRIETY
PRECLUDING THEIR JOINT REPRESENTATION
BY THE FULBRIGHT FIRM

An attorney may not represent clients where such representation threatens the “confidence and respect of the community towards its bench and bar even where the parties have consented to the multiple representation.” *Hesling v. Avon Grove Sch. Dist.*, No. 02-8565, 2007 WL 1030096 (E.D. Pa. Mar. 30, 2007) (*quoting Sapienza v. New York News, Inc.*, 481 F.Supp. 676, 680 (S.D.N.Y.1979)); *see also Simms v. Exeter Architectural Products, Inc.*, 868 F.Supp. 668, 676 (M.D. Pa 1994) (“We are very much concerned about the appearance of impropriety. This concern is necessary if we are to safeguard the integrity of our legal system. And indeed, integrity is the life blood of our system.”).

If nothing else, Fulbright’s joint representation of Cabot and Mrs. Maye taints the integrity of the legal profession. Plaintiffs are concerned that their common representation creates an appearance of impropriety. When deciding if there is an appearance of impropriety, a court “must consider what it believes would be the view of the average layman - someone not familiar with the professional standards.” *Simms*, 868 F.Supp. at 676 (*quoting Price v. Admiral Insurance Co.*, 481 F.Supp. 374 (E.D.Pa.1979)).

In this case, there is actual documentation highlighting the conflict with Fulbright's claimed joint representation. Now, miraculously Cabot's attorneys also represent Mrs. Maye. Even if Mrs. Maye were explained the repercussions of retaining the Fulbright law firm and attempted to waive them, there is still a tremendous appearance of impropriety with attorneys from one of the largest gas producing companies in North America suddenly representing a landowner who is still attempting to get potable water which was contaminated as a result of the gas companies activities. Here,

The risk of failure is so great the multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

204 PA. CODE RULE 1.7(a) cmt 29 (2005).

Ms. Barrette and Fulbright's dual representation also reflects poorly on the Bar. Fulbright is defending Cabot against claims by plaintiffs in Mrs. Maye's exact situation. Mrs. lives directly next door from one of the plaintiff families. A member of the public can surely see that Fulbright would have alternative motives for wanting to represent Mrs. Maye, an affected landowner. One such motive is

that Cabot's counsel does not want Mrs. Maye to testify at the deposition because she possesses information harmful to Cabot's defense, hence filing the motion for a protective order.

The more concerting motive of Mrs. Barrette and Fulbright is surely their desire to keep prior communications between Mrs. Maye and Cabot's attorney privileged under the guise of attorney client privileged communications, which of course they cannot do. Thus Mrs. Barrette and Fulbright's solicited retention from Mrs. Maye appears to be an improper attempt to curtail plaintiffs' access to such communications.

A client-attorney relationship should not be formed merely to protect another client. A relationship founded for this purpose lacks loyalty and candor on behalf of the attorney and is reprehensible. "[T]o protect the critically important candor that must exist between client and attorney, and to engender respect for the court in general, the [] court may enforce the ethical rules governing the legal profession with respect both to client-attorney communications and to conflict-free representation, again regardless of any purported waiver." *U.S. v. Moscony*, 927 F.2d 742, 749 (3d Cir. 1991).

Respectfully, it appears that Mrs. Barrette and Fulbright are not zealously advocating for Mrs. Maye. Rather, they are preying on Mrs. Maye's vulnerabilities to advance Cabot's interests. Worse, they are using the guise of an

“attorney-client” relationship to do so. Mrs. Barrette and the Fulbright law firm are destroying the community’s confidence in the bar. Such improper joint representation has the unfortunate result of breeding distrust for all attorneys.

A court “may disqualify an attorney . . . for failing to avoid even the appearance of impropriety” because courts have the “responsibility to maintain Public confidence in the legal profession.” *Price v. Admiral Ins. Co.*, 481 F.Supp. at 377. “Doubts should be resolved in favor of disqualification in order to maintain public trust in the profession and in the adversary process.” *Vanderveer*, 1994 WL 314257. As the Third Circuit has noted, the perspective that should be evaluated when determining whether a conflict of interest exists is whether the “average layman” would see an impropriety. *In re Eastern Sugar Antitrust Litigation*, 697 F. 2d 524, 530 (3d Cir. 1982).

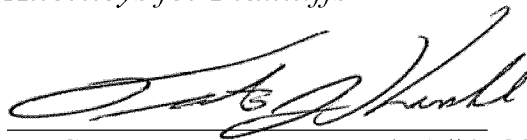
It is respectfully submitted that the average layman would see an impropriety in having Mrs. Barrette and the Fulbright firm representing both the injurer, Cabot, and the injured, Mrs. Maye. Therefore, to maintain public confidence in the legal profession, this Court should disqualify Mrs. Barrette and the Fulbright law firm from representing either the defendants or Mrs. Maye in this action.

CONCLUSION

Plaintiffs respectfully request the Court grant their Motion to Disqualify and enter an order in the form of the Proposed Order attached hereto.

Date: December 30, 2011

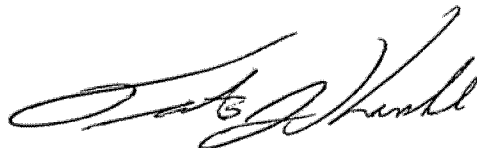
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A handwritten signature in black ink, appearing to read "Tate J. Kunkle", is written over a horizontal line.

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WORD COUNT CERTIFICATION

I hereby certify, pursuant to Local Rule 7.8(d)(2), that the total word count of the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY DEFENSE COUNSEL is 4,778 words.

A handwritten signature in black ink, appearing to read "Tate J. Kunkle", written over a horizontal line.

Tate J. Kunkle

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011, I electronically filed the foregoing

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION TO DISQUALIFY DEFENSE
COUNSEL and DECLARATION OF TATE J.
KUNKLE, ESQ. WITH EXHIBITS

with the Clerk of Court using the CM/ECF system which will send notification of
such filing to all registered users.



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